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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

LINDA MICHELLE  
BOGGESS,

Defendant and Appellant.

2d Crim. No. B293459  
(Super. Ct. No. 2012023255)  
(Ventura County)

Linda Michelle Boggess appeals from the judgment after she pled no contest to two counts of insurance fraud. (Ins. Code, § 1871.4, subd. (a)(1).) The trial court placed her on three years of probation and ordered her to pay victim restitution, a restitution fine, and various fees. Boggess contends the court erred when it ordered the payments without considering her ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).) We affirm Boggess's convictions, and remand the case to give her the opportunity to present evidence demonstrating

her inability to pay certain assessments. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 487 (*Castellano*).)

#### FACTUAL AND PROCEDURAL HISTORY

In June 2016, a jury convicted Boggess of four counts of insurance fraud. We reversed Boggess's convictions on appeal because the trial court erroneously denied her motion to represent herself. (*People v. Boggess* (Aug. 23, 2017, B277790) [nonpub. opn.]; see *Faretta v. California* (1975) 422 U.S. 806.)

On remand, Boggess pled no contest to two counts of insurance fraud. In her plea agreement, Boggess acknowledged that she would be ordered to pay a restitution fine of not less than \$300 and not more than \$10,000 (Pen. Code, § 1202.4, subd. (b)), a court operations assessment of \$40 (Pen. Code, § 1465.8), and two \$30 court facilities assessments (Gov. Code, § 70373). She also acknowledged that she might be ordered to pay a \$150,000 fine (Ins. Code, § 1871.4, subd. (b)) and a penalty of \$27 for every \$10 in fines imposed (Gov. Code, §§ 70372, 76000, 76104.6, 76104.7; Pen. Code, § 1464). The trial court accepted her plea as knowing and voluntary.

The postplea probation report showed that Boggess was unemployed and that her only source of income was \$194 in monthly welfare benefits, which she used to buy food. She had pain in her hands, shoulders, neck, and back. She suffered from bipolar disorder and schizophrenia. She had no assets other than a motorhome valued at \$5,200.

At sentencing, the trial court "operat[ed] under the assumption that [Boggess was] not employed" and "[took] into consideration [her] minimal income." It ordered her to pay \$14,007 in victim restitution (Pen. Code, § 1202.4, subd. (f)), a restitution fine of \$600, and two administrative fees totaling \$550

(Gov. Code, §§ 29550, 29550.1). It also ordered her to pay \$50 per month for probation supervision (Pen. Code, § 1203.1b, subd. (b)). Boggess did not object to any of the payments ordered.

The trial court did not impose a \$1,940 presentence investigative fee due to Boggess's inability to pay. (See Pen. Code, § 1203.1b, subd. (b).) It also did not order her to pay the other fines and assessments set forth in the plea agreement. The prosecutor did not object.

Boggess timely filed a notice of appeal from the judgment. She did not obtain a certificate of probable cause. In a previous order, this court liberally construed Boggess's notice as based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4)(B).)

### DISCUSSION

Boggess contends the trial court erred when it imposed victim restitution, a restitution fine, and various fees without first determining her ability to pay. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) We conclude that Boggess forfeited these contentions.

#### *Certificate of probable cause*

Initially, we reject the Attorney General's argument that we lack jurisdiction to consider the merits of Boggess's challenge to her restitution fine, probation supervision fee, and administrative fees because she agreed to pay them in her plea agreement and did not obtain a certificate of probable cause from the trial court.

In general, a defendant who pleads no contest cannot appeal the conviction without obtaining a certificate of probable cause. (Pen. Code, § 1237.5.) But a certificate is not required for

an appeal based on “[g]rounds that arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(B).) This permits a defendant to appeal alleged errors that occur in postplea hearings to ascertain either (1) the degree of the crime, or (2) the sentence to be imposed. (*People v. Ward* (1967) 66 Cal.2d 571, 576-577.) As to the latter exception, “the critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering [it] subject to the requirements of [Penal Code] section 1237.5.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 76, italics omitted.)

Of the fines and fees the Attorney General argues we lack jurisdiction to consider, three—the probation supervision fee and the two administrative fees—were not included in the plea agreement. Boggess’s claims regarding those fees thus do not challenge the validity of the plea itself. A certificate of probable cause was not required as to them.

The restitution fine was included in Boggess’s plea agreement. But the agreement did not specify the fine to be imposed. Instead, it stated that the fine would range from \$300 to \$10,000. And later, at sentencing, the trial court imposed a \$600 fine.

“When the parties negotiate[d] a maximum [fine], they obviously mean[t] something different than if they had bargained for a specific or recommended [fine].” (*People v. Buttram* (2003) 30 Cal.4th 773, 785, italics omitted.) “By agreeing only to a maximum [fine], the parties [left] unresolved between themselves the appropriate [fine] within the maximum.” (*Ibid.*) “That issue [was] left to the normal sentencing discretion of the trial court, to be exercised in a separate proceeding.” (*Ibid.*) Accordingly, Boggess’s challenge to the court’s exercise of

that discretion “[does] not constitute an attack on the validity of the plea.” (*Id.* at p. 791.) No certificate of probable cause was required for her to appeal the restitution fine.

### *Forfeiture*

The Attorney General next argues Boggess forfeited her challenge to the victim restitution, restitution fine, and fees imposed because she did not object to them at sentencing. We agree. (*People v. Trujillo* (2015) 60 Cal.4th 850, 858 (*Trujillo*) [probation costs]; *People v. McCullough* (2013) 56 Cal.4th 589, 591 (*McCullough*) [administrative fees]; *People v. Avila* (2009) 46 Cal.4th 680, 729 (*Avila*) [restitution fine]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1074-1075 (*Brasure*) [victim restitution].)

Forfeiture is appropriate given the circumstances presented here. Boggess had the right to contest the amount of victim restitution, and to present evidence that the trial court’s calculation was erroneous. (*Brasure, supra*, 42 Cal.4th at p. 1075; see also Pen. Code, § 1202.4, subd. (f)(1).) The court had to consider her ability to pay a restitution fine because it set the fine above the statutory minimum. (*Avila, supra*, 46 Cal.4th at p. 729; see Pen. Code, § 1202.4, subd. (c).) The court’s imposition of administrative fees also required a finding that Boggess had the ability to pay. (*McCullough, supra*, 56 Cal.4th at p. 592; see Gov. Code, § 29550, subd. (d)(2).) So did the calculation of probation costs. (*Trujillo, supra*, 60 Cal.4th at p. 855; see Pen. Code, § 1203.1b, subds. (a) & (b).)

Such factual findings “are not readily susceptible [to] correction on appeal.” (*McCullough, supra*, 56 Cal.4th at p. 594.) Thus, if Boggess felt that the trial court erroneously calculated the amount of victim restitution or did not fully consider her ability to pay, she should have brought those alleged errors to the

court's attention at that time. (*Id.* at p. 593.) Because she did not do so, she forfeited these contentions on appeal.

Relying on *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, Boggess counters that no objection was required to preserve her contentions for appeal because they are based on the insufficiency of the evidence to support the trial court's orders. But our Supreme Court has disapproved *Pacheco's* holding. (*Trujillo, supra*, 60 Cal.4th at p. 858, fn. 5; *McCullough, supra*, 56 Cal.4th at p. 599.) Boggess "may not 'transform . . . a factual claim into a legal one by asserting the record's deficiency as a legal error.' [Citation.]" (*McCullough*, at p. 597.) She forfeited her challenge to the trial court's orders to pay victim restitution, a restitution fine, administrative fees, and the probation supervision fee.

*A limited remand is required*

The Attorney General argues we should impose a court operations assessment of \$40 and two \$30 court facilities assessments because the trial court did not do so at sentencing. (Cf. *People v. Price* (2004) 120 Cal.App.4th 224, 241, fn. 25 [the Attorney General may raise a sentencing issue on appeal despite the failure to file a cross-appeal].) While these assessments were mandatory at the time of Boggess's sentencing (*Dueñas, supra*, 30 Cal.App.5th at p. 1163), and thus did not require the prosecutor to object to preserve the issue for appeal (*People v. Smith* (2001) 24 Cal.4th 849, 852-854), imposition of them is now subject to Boggess's ability to pay (*Dueñas*, at p. 1164). This court is ill-equipped to make that finding in the first instance. (*McCullough, supra*, 56 Cal.4th at p. 594.) A limited remand is accordingly required to permit Boggess to present evidence of her inability to

pay the court operations and court facilities assessments.  
(*Castellano, supra*, 33 Cal.App.5th at pp. 489-491.)

DISPOSITION

The matter is remanded to the trial court with directions to give Boggess the opportunity to request a hearing on her ability to pay the court operations assessment (Pen. Code, § 1465.8) and the court facilities assessments (Gov. Code, § 70373). If Boggess does not demonstrate her inability to pay, the court must impose the assessments. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Bruce A. Young, Judge

Superior Court County of Ventura

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Jolene Larimore, under appointment by the Court of  
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